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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LUIS ARMANDO BUENROSTRO, Defendant and Appellant.	B230967 (Los Angeles County Super. Ct. No. VA109624)
In re LUIS ARMANDO BUENROSTRO, on Habeas Corpus.	B240440

APPEAL from a judgment of the Superior Court of Los Angeles County. ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Margaret M. Bernal, Judge. Judgment reversed; petition dismissed as moot.

Susan Wolk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Idan Ivri and Stephanie C. Brenan, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Luis Buenrostro was convicted of one count of attempted murder with the personal discharge of a firearm causing great bodily injury (Pen. Code, §§ 187, subd. (a)/664; 12022.53, subd. (d)),[1] one count of possession of a firearm by a felon (§ 12021, subd. (a)(1), and one count of assault with a firearm during the commission of which he personally used a firearm and inflicted great bodily injury (§ 245, subd. (a)(2); 12022.5, subd. (a); 12022.7, subd. (a)). The court sentenced defendant to a total of 35 years to life. Defendant appealed, raising numerous issues, including many examples of alleged prosecutorial misconduct and ineffective assistance of counsel.

On April 13, 2012, while the appeal was pending, defendant filed a petition for writ of habeas corpus. We asked for an informal response from the parties and informed the parties that the petition would be considered with the appeal. We then issued an Order to Show Cause (OSC) in August 2012. The OSC directed the People to file a return and the petitioner to file a traverse.

We reverse the judgment and dismiss the petition as moot.

FACTUAL BACKGROUND

During the afternoon of January 22, 2009, George Ramirez was shot in the driveway of the home he shared with his sister Cindy Ramirez in Whittier after an argument with another man.[2] Police arrived shortly thereafter and interviewed Cindy. George was transported to the hospital and was interviewed there by detectives.

Defendant was charged in connection with the shooting and a two-day trial took place in January 2010.

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[1] All further statutory references shall be to the Penal Code unless otherwise indicated.

[2] We will refer to them as George and Cindy to avoid confusion. We intend no disrespect.

I. Eyewitnesses

At trial, Cindy testified that on the day of the shooting, she was at home and heard a commotion outside. When she looked through the living room window, she saw a black SUV parked in the driveway of the house. George was arguing with a man standing in the driveway. There was at least one person in the car.

The man arguing with George was bald and skinny; Cindy had seen the man at the house in the past. The argument escalated to shoving. At one point in the argument, George and the man were both standing outside the car. At another point, Cindy saw George pushing on the door of the SUV, while the other man was inside the car.

Cindy got a bad feeling about the situation and went back to her room. She then heard a metallic bang. George then rushed into the house, yelling and bleeding from his lower back and buttocks. The SUV left.

An ambulance and the police arrived about five minutes later. Cindy spoke with police officers.

Cindy did not see a person holding a gun. Cindy testified she did not recognize defendant as someone whom she had seen with George in the past or as the person scuffling with George. She did not recognize anyone in the courtroom who looked like the person she saw with George. She admitted she had circled a photograph as the person she had previously seen at her house (Exhibit 3) but that was not the person with whom George was fighting.

Cindy testified she did not recall telling a police officer that she thought the person with whom George argued was named Poncho. Cindy recalled telling police that Poncho looked familiar when they showed her a six-pack with a photograph of Poncho. Cindy told police that Poncho was not involved in the attack on George.

At trial, George was in custody for contempt of court after failing to appear in this matter. George testified he did not remember anything about the circumstances of the shooting, other than that he was shot in his right buttocks area. George denied knowing defendant or ever seeing defendant prior to trial. George admitted he signed an

admonition for a photograph identification but he said he did not understand it. He denied or did not remember identifying a picture of the shooter. He identified a picture of Poncho, but only because he knew him. He did not remember who shot him. He said he does not use drugs on a daily basis and did not remember if he used drugs on the day of the shooting.

He denied telling police that defendant was a gang member and denied he said he was afraid defendant's friends would retaliate if he testified. He did not remember anything about his preliminary hearing testimony.

George was discharged from the hospital after one day. George testified that the bullet wound was painful and occasionally caused him discomfort. The bullet was still inside him.

II. Medical Testimony

Dr. Cristobal Barrios testified at trial he treated George for a gunshot wound at UCI Medical Center on January 22, 2009. He gave George some pain medication, but said the drugs were not likely to have any effect on George's long-term memory. There was no alcohol in George's system when he was admitted.

George told hospital personnel that he routinely drank 10 beers per day and used marijuana and methamphetamine, but did not test positively for alcohol at the hospital. There was no indication that his blood was tested for narcotics. Hypothetically, someone under the influence of those drugs might have memory problems, but Dr. Barrios did not notice any sign that George was intoxicated.

III. Law Enforcement Testimony

Los Angeles County Sheriff's Deputy Timothy Holt testified he responded to the crime scene around 1:00 p.m. on January 22. Holt saw several people running around and one person who had been shot in the buttocks. An ambulance arrived shortly thereafter.

Holt spoke to George at the hospital. George said he understood Holt's questions and agreed to explain the nature of the incident. George told Holt he had been arguing in

the driveway of his home with a man named "Prowler" over a stolen cellular phone. Prowler had driven to George's home in a gray Nissan Armada SUV.

Deputy Holt said that George told him he punched Prowler in the face. Another man from the SUV got involved in the fight, and Prowler ran to the driver's side of the car and retrieved a chrome-colored revolver. George started running toward his house. Prowler shot George in the buttocks as George ran. George told Holt that he and Prowler had grown up together. George described Prowler as a male Hispanic, five feet eight inches tall, with brown hair and brown eyes, and an average build. Prowler's first name was Luis. Holt passed that information along to a police gang unit.

Sheriff's Deputy Luis Zamorano testified that several years earlier, he learned from defendant that he used the name Prowler. Zamorano memorialized that information on a field identification card.

Sheriff's Deputy Jose Lopez testified he spoke to Cindy about the incident at her home shortly after the shooting. When asked about possible suspects, Cindy said that a man named Poncho frequently visited the house.

Detective Gina Kolowski from the Los Angeles County Sheriff's Department testified she spoke with George at the hospital. George was conscious and had no trouble understanding her questions and did not appear to be under the influence.

At the hospital, Detective Kolowski showed George two sets of photographs in an effort to identify his attacker. George did not identify anyone in the first set. George identified one person in the second set, not as the shooter, but as a friend named Poncho.

Kolowski testified that George said the incident began when a man called Prowler pulled into George's driveway. Prowler exited the car and told George, "'Hey, I've been trying to call you.'" George became enraged at that comment because he believed that Prowler had stolen his (George's) cellular phone. George punched Prowler in the face. George told Kolowski he believed there were three people in the car besides Prowler.

George said that Prowler then ran back to the driver's side of the car and retrieved a chrome or silver-colored revolver from the floorboard. At first, George pushed the

doors of the vehicle shut so Prowler could not get back out of the car to aim the gun. Eventually, George tried to run back to his house. George ran around the back of the car to prevent Prowler from getting a clear shot. George was shot from behind as he approached his front door. After being shot, George continued to run toward his home, went inside, and shut the door.

Kolowski gave George a photographic lineup of possible suspects. Kolowski noticed George had a strong reaction to photograph number three, but he denied recognizing any of the individuals. Kolowski did not believe George was being honest; she gave George a second set of photographs. In the second set, there was a photograph of a man Cindy earlier had indicated was George's friend. George also denied recognizing anyone in the second set. Kolowski told George that another witness had already identified someone in the second set as a person who frequented George's home. At that point, George admitted to knowing the man in the second set (Francisco Casillas).

Kolowski then returned to the first set of photographs and again asked George if he recognized anyone. This time, George pointed to photograph No. three and said, "'This is him. This is the guy who shot me and he was the driver of the vehicle.'" However, George refused to circle the photograph because he was afraid Prowler's "'homies'" or "'other gang members'" would come after him.

Detective Kolowski showed Cindy a set of photographs and Cindy identified No. four, Francisco Casillas, as someone who came to the house frequently. Kolowski testified that no weapon was ever recovered.

IV. Defense

No defense witnesses were called to testify. Defense counsel argued in closing that George was not credible because he had used drugs and alcohol that day, that the shooting was not intentional because there was only a single shot, and also argued that the shooting was in self-defense.

CONTENTIONS ON APPEAL AND IN THE PETITION

1. The Appeal

In his appeal, defendant raises the following contentions: (1) the court erred in denying him a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d, 118 (*Marsden*); (2) the prosecutor committed numerous instances of misconduct, particularly by repeatedly making references to gangs; (3) the court erred in failing to limit the gang testimony; (4) defendant did not receive effective assistance of counsel in numerous instances during trial; (5) the court erroneously failed to instruct the jury on imperfect self-defense, oral admissions and gang evidence; (6) the evidence was insufficient to support the great bodily injury allegations; (7) defendant's constitutional rights were violated because his requests for an investigator and further discovery were denied; (8) his sentence constituted cruel and unusual punishment; and (9) the cumulative effect of the errors resulted in a fundamentally unfair trial.

In its respondent's brief, the People contend that conduct credits were improperly calculated.

2. The Habeas Corpus Petition

In his petition, defendant contends he was deprived of effective assistance of counsel by his attorneys due to the following errors and omissions: (1) failure to object to the admission of Trial Exhibit 6 (a prison packet showing 11 prior convictions) or Trial Exhibit 7 (which included correspondence and a declaration regarding the District Attorney's personal opinion of defendant's guilt) or requesting limiting instructions as to both exhibits; (2) failure to object to the admission of gang-related testimony, and to voir dire the jury as to the views on gangs; (3) giving a closing argument that was too short and argued irrelevant issues and failed to argue the primary defense; (4) failure to conduct an adequate voir dire (too short, not enough jurors questioned); (5) making only a single peremptory challenge; (6) waiver of opening statement; (7) failure to object to several instances of prosecutorial misconduct; (8) failure to seek defendant's permission before having co-counsel participate in the case; (9) failure to ask for a hearing outside

the presence of the jury before defendant expressed dissatisfaction of counsel; (10) violating the attorney-client privilege; (11) failure to request CALCRIM No. 358 on defendant's oral admission to Deputy Zamorano that his nickname was Prowler; (12) failure to file a pre-trial discovery motion pursuant to section 1054; (13) failure to file an Evidence Code section 402 motion requesting exclusion of all gang evidence; (14) failure to object to the mention of defendant's nickname "Prowler"; (15) failure to mention that Deputy Zamorano never produced the field identification card corroborating defendant's admission to the nickname "Prowler"; (16) failure to object to the first three gang references by the prosecutor; (17) failure to object to the jury instruction on gang evidence; (18) failure to object, move to strike or ask for jury admonitions about the prosecutor's misconduct; and (19) refusal to cooperate with appellate counsel by failing to accept or respond to correspondence.

Defendant submitted six exhibits in conjunction with his petition. Two of the exhibits were copies of correspondence mailed to his trial counsel (Montanez), one was a copy of a state bar opinion on ethics, one contained state bar information on Montanez, one was a declaration from the court reporter on time elapsed per page of transcript, and one was a printout of newspaper articles on criminal gangs in Norwalk, where the trial took place.

DISCUSSION

We discuss only those contentions which bear on our conclusion that the cumulative effect of admitting gang evidence and evidence of defendant's prior criminal convictions affected the outcome of this trial.

I. Gang Evidence

A. References to Gang Membership

In both the appeal and the habeas corpus petition, defendant raises many contentions with respect to the gang evidence presented at trial. These claims include prosecutorial misconduct, trial court error in admitting the evidence and in instructing the

jury, ineffective assistance of counsel and cumulative error. Because so many of these claims are related, we discuss them together.

1. Pretrial Motion

Prior to trial, the court held a hearing pursuant to Evidence Code section 402 on how to best raise the issue of defendant's street name, Prowler.

The court indicated to the prosecutor that the name could be referred to as a nickname to avoid any gang connotation since there was no gang allegation. Defense counsel indicated he would object to any use of the term "moniker." The prosecutor also indicated he would sanitize any reference made by police officers to defendant's reference to himself as "Prowler."[3] Defense counsel did not object to the use of the name "Prowler."

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[3] The colloquy was as follows:

"The Court: As far as 402 is concerned, my understanding is People are requesting to refer only to the moniker and not as to any other gang affiliation. [¶] Were you planning on referring to it as a moniker?

"Mr. De Rose [the prosecutor]: Simply a name he goes by, a nickname. I can use any term.

"The Court: Nickname would be appropriate.

"Mr. De Rose: Fine with me.

"The Court: That way we can keep any gang connotation out of it.

"Mr. Montanez: Yes, your Honor. If the word moniker comes in, either from response from a witness or a propounded question by the prosecutor, I would object because there is no allegation of gang.

"The Court: Right. However –

"Mr. Montanez: And would prejudice the jury.

2. Failure to Voir Dire Jury on Gang Prejudice

Defendant claims he received ineffective assistance because his counsel did not conduct an adequate voir dire. Elsewhere in his appellate brief, he points out that counsel did not question the prospective jurors about their gang connections or knowledge of criminal gangs, which was important in light of the numerous gang references.

3. Prosecutor's Opening Statement

During his opening statement, the prosecutor argued:

> Members of the jury, we are here today because fear is powerful motivator. And the defendant, Mr. Buenrostro, is counting on that fear that he instilled with George Ramirez when he shot him last year to taint his testimony. He is counting on George Ramirez to take that stand and not tell us what happened on January 22, 2009

Defense counsel did not object. The prosecutor then continued: "Mr. DeRose: But when [George] was asked by the detectives to circle the photograph and write the statement on the six-pack as Cindy Ramirez had done, he refused. Find out he refused out of fear.

"The Court: I agree. We will keep all gang references out. They are not necessary for this particular case. [¶] However, if People need to bring in him known as something else, as a nickname of some sort, the Court would order that to be, him to discuss that with his witnesses.

"Mr. De Rose: Yes, your Honor. And as far as –

"The Court: To relate to it as a nickname as opposed to a moniker.

"Mr. De Rose: The only other issue, I am not aware for the reason of the contact between law enforcement and the defendant that [led] to himself admitting he was known as Prowler. [¶] I will speak to the officer and sanitize that as well. All I care about is that is what he said he goes by.

"The Court: Thank you."

Out of fear that the defendant or one of his friends would retaliate against him." Defense counsel then objected on the grounds it was improper argument and the court responded: "Court will strike the term retaliate. Continue on.

Defense counsel waived opening statement.

4. Examination of George

During the prosecutor's examination of George, the following colloquy occurred:

"[The prosecutor]: And, again, you are not afraid of the defendant?

"[George Ramirez]: No, sir.

"[The prosecutor]: *You don't think he is a gang member?*

"[George]: No sir.

"[The prosecutor]: *You never told the police that you thought he was a gang member?*

"[George]: No sir." (Italics added.)

Defense counsel did not immediately object to this questioning.

After George completed his testimony, defense counsel moved for a mistrial, or in the alternative, for an admonition to the jury, based on the gang references and on references made by the prosecutor in his opening statement. The prosecutor responded as follows: "Yes, Your Honor. The reason that statement was brought in was, one, to show the victim's state of mind currently and on prior occasions when he was evasive or didn't testify. I do not intend to introduce any evidence that the defendant is, in fact, a gang member. What is relevant is the witness' perception of whether or not the defendant is a gang member. And if the court wishes to admonish the jury that this is the case and that there is no evidence of his actual gang membership, I am perfectly fine with that."

The court denied the motion for mistrial, stating, "Whether the witness was frightened or not by his perception of whether the defendant was a gang member is relevant to his testimony on today's date since it was all very evasive and, 'I can't remember. I can't remember.' [¶] However, the Court may consider at the conclusion, an instruction to the jury that there is no evidence of gang membership if I feel it is

warranted; however, defendant's gang membership, we will deal with that when we get to it."

5. Examination of Deputy Holt

During the examination of Deputy Holt, the prosecutor asked:

"[The prosecutor]: When you received the name Prowler and first name Luis [from the victim], did you ever provide that to other investigating officers?

"[Deputy Holt]: Yes, I did.

"[The prosecutor]: Do you recall who that was?

"[Deputy Holt]: No, I don't.

"[The prosecutor]: Would it have been whoever the investigating detective on the case is?

"[Deputy Holt]: *It would have been to one of the gang units*." (Italics added.)

Defense counsel did not object.

6. Examination of Deputy Zamorano

During the examination of Deputy Zamorano, the prosecutor questioned him as follows:

"[The prosecutor]: When you spoke with the defendant, did you ask him if he went by any nickname other than Luis Buenrostro?

"[Deputy Zamorano]: Yes.

"[The prosecutor]: What did he say?

"[Deputy Zamorano]: He said he went by the moniker of Prowler.

"[The prosecutor]: I have nothing further.

"The Court: Anything else?

"Mr. Montanez: Good afternoon. Your Honor, I would like the Court to admonish witness.

"The Court: Okay. I understand. We will deal with it afterwards."

At the conclusion of Zamorano's testimony and out of the presence of the jury, the court addressed Zamorano's use of the word "moniker":

"The Court: The witness indicated the defendant used a moniker. The Court had specifically indicated he was not to state moniker, but to use the name nickname instead. [¶] I chose not to bring it up, to bring it up at side bar, not to put any undo emphasis on it at that point. Not identified what a moniker is. Defined it. [¶] Did you want to say anything on either side?

"Mr. Montanez: I will submit.

"[The prosecutor]: Only thing I would point out is he was working in custody. It was, in fact, a gang detail and gang information card. I did my best to keep him from saying it.

"The Court: I think it is harmless at this point, so, I will allow it to continue on, but just wanted to put that on the record."

7. Examination of Detective Kolowski

During the examination of Detective Kolowski the following exchanges took place:

"[The prosecutor]: And could you just briefly give us some background on how you became involved with the case.

"[Detective Kolowski]: I was actually at the station when I heard the call go out. I realized it was a shooting case and because of the area, *may be gang related*." (Italics added.)

Defense counsel did not object.

"[The prosecutor]: Did you ask [the victim] if he knew Prowler from before this incident?

"[Detective Kolowski]: Yes, I did.

"[The prosecutor]: What did he say in regards to that?

"[Detective Kolowski]: He said he grew up with Prowler. And I asked him if he knew his name, his real name. And he said he knew his first name was Luis and *that he was from Southside Whittier gang*.

". . . .

"Mr. Montanez: Your Honor, I would object as to the latter portion of that answer. Motion to strike.

"The Court: Overruled. At this point. For the reasons previously stated."

"[The prosecutor]: Now, after you had asked [the victim] for more information on this person who he had identified as shooting him, did you ever ask him why he wasn't being forthcoming?

"[Detective Kolowski]: Yes.

"[The prosecutor]: What did he tell you?

"[Detective Kolowski]: Well, I asked him why he wouldn't circle the person and initial [a photograph of defendant] like I had asked to identify the suspect and he said he was afraid. [¶] And I asked him why was he afraid and he said he was afraid that the *Prowler homies* would come after him. And when I asked, "Homies?", he said, "*Yeah, his other gang members*."

Defense counsel did not object.

8. Prosecutor's closing argument

During closing, the prosecutor argued: "Like I said on my opening statement, we were here because the defendant was anticipating that George Ramirez would get up and he wouldn't tell you what happened."

Defense counsel did not object.

9. Jury Instruction

At the trial's close, the court instructed the jury: "During the trial, evidence that George Ramirez believed Defendant was a gang member was admitted for a limited purpose. That purpose was to show identification and to explain George Ramirez' state of mind. You may consider that evidence only for that purpose and for no other. No evidence was presented that Defendant is, in fact, a gang member."

Defense counsel did not object.

B. Defendant's contentions

Defendant asserts that because the court's pretrial ruling forbade any gang references or connotations, the prospective jurors were not voir dired about any experiences they or someone close to them might have had with gang members or about any prejudices, bias and foregone conclusions harbored against gang members, meaning he was denied the opportunity to select a fair and impartial jury.

Next, defendant claims that the prosecutor committed misconduct by repeatedly eliciting testimony about his gang membership. In a related contention, defendant argues that since the trial court permitted the questioning and did not strike witness testimony about gangs, the court abused its discretion when it failed to limit the gang evidence and cure the misconduct. In other instances, when defense counsel did not object to the misconduct, defendant raises the contention of ineffective assistance of counsel.

In his habeas petition, defendant raises his counsel's general failure to object to any of these instances of misconduct, his counsel's failure to voir dire the jury on gang knowledge, failure to object to the jury instruction on gang evidence, failure to ask the prosecutor for corroborating evidence on Deputy Zamorano's testimony that defendant admitted to the moniker "Prowler", and failure to object to the court's reversal of its pre-trial order that no reference be made to gangs.

In the habeas petition, appellate counsel alleges that she sent trial counsel a packet of materials in order to ascertain the reasons for his acts and omissions at trial. The first packet was sent certified mail, and was returned to her as "unclaimed." She then sent a condensed version of the first packet by regular mail, but never heard from trial counsel and never received it back from the post office.

C. Admissibility of Gang Evidence

The trial court has great discretion in determining the admissibility of evidence, and on appeal, we find reversible error if the trial court's exercise of its discretion was arbitrary, capricious, or patently absurd resulting in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, abrogated on another point as stated in

People v. Prieto (2003) 30 Cal.4th 226, 263, fn. 14.)" (*People v. Williams* (2009) 170 Cal.App.4th 587, 606.)

Gang evidence is admissible if it is logically relevant to some material issue in the case such as motive, intent, or elements in a substantive gang crime or gang enhancements, is not more prejudicial than probative, and is not cumulative. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192; *People v. Williams, supra,* 170 Cal.App.4th at p. 609.) Gang evidence is not admissible if introduced only to show a defendant's criminal disposition or bad character. Because gang evidence may have a highly inflammatory impact on the jury, trial courts should carefully scrutinize such evidence before admitting it, even if it is relevant. (*People v. Williams, supra,* 16 Cal.4th at p. 193; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.)

The applicable test for prejudice is "whether it is reasonably probable that a result more favorable to defendant would have occurred had the objectionable gang testimony not been admitted." (*People v. Bojorquez, supra,* 104 Cal.App.4th at p. 345.)

"In cases not involving a section 186.22 gang enhancement, it has been recognized that 'evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]' (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)" (*People v. Avitia, supra,* 127 Cal.App.4th at p. 192.) Admission of gang evidence is prejudicial if guilt evidence is weak and the evidence of gang retribution and gang violence is pervasive. (*People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.)

D. Prosecutorial Misconduct

When a prosecutor's conduct is so egregious that the trial is infected with unfairness resulting in a denial of due process, it rises to the level of federal constitutional error. Misconduct under state law occurs if it involves the use of deceptive or reprehensible methods of persuasion. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.)

"""To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.""" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 841 ["As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety."].) Unless an objection/request for admonishment would have been futile, a defendant forfeits the issue by the failure to object. (See *People v. Jasmin* (2008) 167 Cal.App.4th 98, 116.)

E. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must establish his counsel's performance was below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial would be different. (*People v. Seaton* (2001) 26 Cal.4th 598, 696, citing *Strickland v. Washington* 466 U.S. 668.) A reasonable and informed tactical decision made by defense counsel in light of the facts apparent at the time of trial and founded upon investigation and preparation, does not constitute ineffective assistance of counsel. (*In re Hall* (1981) 30 Cal.3d 408, 426.) Because it is not normally apparent from the record why a defense counsel has acted or failed to act the way he or she did, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus. (*People v. Seaton, supra,* 26 Cal.4th at p. 697.)

F. The Cumulative Effect of Admission of Gang Evidence

At the outset of trial, the trial court acknowledged that since there was no gang allegation, there should be no reference to gang monikers. Defense counsel did not object to the use of the name "Prowler." Then, during trial, when defense counsel moved for a mistrial, the court appeared to back away from a blanket ban on gang references and stated it would utilize a case-by-case consideration of the membership. Thereafter, when

the prosecutor was questioning law enforcement personnel, there were repeated references to gang membership in relation to defendant. Sometimes defense counsel objected, but sometimes he did not. The prosecutor then referred to retaliation by defendant's fellow gang members which result in George's refusal to testify at trial.

We conclude that the gang evidence was erroneously admitted and resulted in a miscarriage of justice.

The reasons for the erroneous admission, however, are a combination of prosecutorial misconduct and ineffective assistance of counsel. And some of the errors were due to the trial court's ruling overruling defense counsel's objections. There was not one cause. Even when then court offered curative admonitions to the jury, at some point they ceased to become effective and also served to highlight the gang affiliation of defendant. So in some instances, defense counsel had a tactical reason for failing to object.

The repeated references to gangs compounded the effect. There were references to gangs in the testimony of George, Deputy Holt, Deputy Zamorano and Detective Kolowski. Then the prosecutor referred to defendant's nickname and to possible retaliation as an explanation for George's failure to remember anything at trial. All of these references, taken together, paint the picture of defendant as a member of a criminal gang.

Evidence of a relationship, such as common membership in an organization between a witness and a party is admissible to show bias. But when other evidence has established such a relationship, then evidence of common membership is cumulative, and if it is prejudicial, is inadmissible. (*People v. Maestas, supra,* 20 Cal.App.4th at p. 1495.)

Here, there was evidence that George knew defendant and Poncho and Poncho had been over to his house frequently. This did not need to be proven by common membership in a gang.

The People contend in their respondent's brief that the gang evidence was relevant and admissible because George told Kolowski that he did not want to identify defendant

as the shooter because he was afraid Prowler's "homies" or "other gang members" would come after him. However this was precisely the type of reference that should have been stricken or sanitized to refer to "friends" or "associates." It should not be used to bootstrap to additional, prejudicial evidence which otherwise had no relation to the crime at issue.

Evidence that defendant was a gang member seriously undercut his defense. There was no strong evidence of identity. The only incriminating evidence was the out-of-court testimony of the eyewitnesses. Several factors detracted from identification of Cindy and George. They both refused to identify defendant at trial, and Cindy only identified Poncho being at the scene, not defendant. Other factors diminished their credibility. There was no laboratory or forensic evidence identifying defendant. No weapon was recovered. The vehicle at the scene was not tied to defendant.

In addition, there was no strong evidence of motive. There was no evidence that George and defendant belonged to rival gangs. The only evidence of motive was the theft of a cell phone, not gang competition or establishment of territory. Evidence of defendant's gang membership suggested to the jury that he had a criminal disposition and was likely to have committed the attack. The changing testimony of the prosecution's witnesses was likely viewed by the jury as evidence of gang intimidation or fear of retaliation. (*People v. Avitia, supra,* 127 Cal.App.4th 195.) The erroneous admission of the gang references were prejudicial, particularly given the number of times the references were made in such a brief trial.

The prejudicial effect of this evidence is obvious and significant. The evidence "'made it a near certainty that the jury viewed [defendant] as more likely to have committed the violent offenses charged against him because of his membership in the [ ] gang.' (*People v. Cardenas* [(1982)] 31 Cal.3d [897,] 906.)" Moreover, it provided a basis for the conflicting stories given by the victims at trial and to the officers because gang members may often intimidate witnesses. (*People v. Bojorquez, supra,* 104 Cal.App.4th at p. 344.)

In *People v. Memory* (2010) 182 Cal.App.4th 835,two members of a motorcycle gang were charged in a murder. The prosecutor's evidence was conflicting and the defense theory of self-defense hinged on the credibility of the defendants. The prosecutor made numerous references to the motorcycle gang, and compared it to the Hell's Angels gang as a criminal enterprise. The court of appeal held: "Given the jumble of inconsistent descriptions of the [incident], this was not a case where the jury had only to choose between the People's and the defense's version of events and the evidence was overwhelming in favor of the prosecution. . . . The evidence about the [gang] served not only to destroy defendants' credibility and paint them as violent, but also to bolster the credibility of prosecution witnesses who were otherwise suspect. . . . Without the irrelevant, inflammatory evidence, a different outcome on all counts was reasonably probable, even if the jury largely accepted the prosecution's version of events." (*Id.* at p. 863.)

In *People v. Albarran* (2007) 149 Cal.App.4th 214, a defendant was tried for attempted murder, shooting at an inhabited dwelling and attempted kidnapping for carjacking, with allegations that the offenses were committed for the benefit of a criminal street gang. Prior to trial, the defendant sought to exclude gang evidence. (*Id.* at p. 229.) That motion was denied, and defendant was ultimately convicted of all the offenses and the gang allegations were found to be true.

The prosecution presented lengthy testimony about a specific gang, the identities of the members, the wide variety of crimes they had committed, and numerous contacts between officers and gang members other than the defendant, including threats to kill the officers. The prosecutor also referred to another gang during opening statement. In addition, the prosecutor made statement in closing argument about defendant's criminal disposition. During trial, three eyewitnesses identified defendant and the defendant admitted involvement in the shooting. (*Id.* at pp. 220-222.)

The court admonished the jury that gang evidence could not be considered on the issue of the defendant's character. (*Id.* at p. 221.) Defendant then filed a new trial

motion and the trial court granted it with respect to the gang allegations, but found the gang evidence was relevant to the underlying offenses.

On appeal, defendant argued the prejudicial effect outweighed the probative value, but also argued that the admission of the evidence was so serious as to violate his federal constitutional right to due process, rendering his trial fundamentally unfair.

The majority opinion concluded that "certain extremely prejudicial gang evidence was not relevant to the underlying charges," and given the highly inflammatory nature of the gang evidence, the error was not harmless. There was the possibility that the jury improperly inferred that whether or not the defendant was involved in these shootings, he had committed other crimes, would commit crimes in the future and posed a danger to the police and society in general. It held that, "In our view, looking at the effect of this evidence on the trial as whole, we believe that this prejudicial gang evidence was '"of such quality as necessarily prevents a fair trial."' (*Jammal v. Van de Kamp* [(9th Cir. 1991)] 926 F.2d [918,] 920.)" (*Id.* at pp. 230-231.)

We agree with defendant that the trial court abused its discretion by repeatedly allowing reference to a gang. No section 186.22 gang enhancement was alleged. There was no showing that the attack was made in retaliation for gang activity or that the victims were members of or related to a rival gang. Appellant and Poncho were not identified by gang tattoos or clothing. The gang evidence was completely irrelevant to identity. There was no evidentiary link between the gang membership and the disputed issues at trial.

These references made it a near certainty that the jury viewed defendant as more likely to have committed the violent offenses. (*People v. Cardenas, supra,* 31 Cal.3d at p. 906.)

II. Prior Crimes Evidence

In his brief, defendant raises several claims of prosecutorial misconduct involving evidence of his prior criminal history. As with the gang evidence, defendant raises the claim of ineffective assistance of counsel because his trial lawyer failed to object to the

introduction of prior crimes evidence. Defendant further suggests the court abused its discretion when it failed to redact Exhibit 6 and allowed the jury to have access to that exhibit without a limiting instruction declaration.

1. Incident A (misconduct based on alleged evidentiary error in defendant's brief)

Defendant was charged with possession of a firearm by a felon. The information also alleged that defendant served four prior prison terms pursuant to section 667.5, but those allegations were never submitted to the jury, nor proved and were stricken at sentencing.

The prosecutor introduced into evidence a packet of documents (People's Exhibit 6x) which included evidence of defendant's 11 prior felony convictions and his prison history. Defense counsel did not object to the introduction or admission of this evidence.

During closing, the prosecutor argued this evidence was necessary to prove an element of the charged offense of possession of a firearm by a felon.

2. Incident B (alleged evidentiary error)

"[Mr. Montanez]: And did you have some information about [the victim] before meeting with him?

"[Detective Kolowski]: Mr. Ramirez?

"[Mr. Montanez]: Yes.

"[Detective Kolowski]: That he was the victim and that he went to the hospital.

"[Mr. Montanez]: You didn't really know he was [a] recently convicted felon still on probation?

"Mr. De Rose: Objection. Relevance.

"The Court: Sustained."

3. Effect of Prior Criminal History Evidence

"As a general rule, evidence the defendant has committed crimes other than those for which he is on trial is inadmissible to prove bad character, predisposition to criminality, or the defendant's conduct on a specific occasion. (*People v. Avila* (2006) 38 Cal.4th 491, 586.)" (*People v. Williams, supra,* 170 Cal.App.4th at p. 607.) Evidence of

a defendant's past acts is only relevant to prove a material fact such as identity, motive or knowledge. (*Ibid*.) "Courts have recognized that evidence of other crimes is extremely inflammatory, and the trial court must take great care to evaluate its admissibility. (*People v. Roldan* [(2005)] 35 Cal.4th [646,] 705.) The trial court must find that the evidence has substantial probative value that is not outweighed by its potential for undue prejudice. (Evid. Code, § 352; *Ewoldt* [(1994)] 7 Cal.4th [380,] 404.)" (*People v. Williams, supra,* 170 Cal.App.4th at p. 610.) "We evaluate error in the admission of prior crimes evidence using the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, under which we determine whether it was 'reasonably probable that a result more favorable to defendant would have resulted' had the prior crimes evidence not been admitted. (*People v. Welch* (1999) 20 Cal.4th 701, 750.)" (*People v. Williams*, *supra*, 170 Cal.App.4th at p. 612.)

Here, there was no reason to have the entire prison packet given to the jury. All the prosecution had to prove was one prior felony conviction for the possession of a firearm by a felon charge. None of the prior conviction allegations were argued or submitted to the jury. Certainly, the presentation of the 11 prior convictions and their nature had an impact on the jurors. It is certainly hard to conceive of a tactical reason for failing to object to the admission of the entire packet of evidence. Only proof of one felony conviction was necessary to prove the possession of a firearm by a felon count. In fact, there were a number of ways that defendant's status as a felon could have been established without the introduction of any documents whatsoever. Defense counsel could have stipulated to the fact of one prior conviction or have defendant admit it on the stand. The four prior convictions alleged in the information were never brought before the jury, and were probably all but forgotten by the time the case was submitted. Whether a result of prosecutorial misconduct, ineffective assistance of counsel, or trial court error, or a combination of all three, the admission of the packet resulted in the inference that defendant had a bad character, predisposition to criminality or a propensity towards violence.

III. Cumulative Effect

"'[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant.' [Citation.]" (*People v. Cardenas, supra,* 31 Cal.3d at p. 905.)

As evidenced by the record, the trial was rife with errors. The repeated references to defendant's gang membership and prior convictions, which were not relevant, infected the whole process. With this evidence, the jury was led to one conclusion—that defendant was hardened criminal with a propensity for violence. Each individual error may have been harmless standing alone, but the cumulative effect of those errors was prejudicial, rendering the trial fundamentally unfair. Reversal of all counts is thus required. (*People v. Hill* (1998) 17 Cal.4th 800, 844-847.)

DISPOSITION

The judgment is reversed. Appellant may be retried on all charges.

The order to show cause issued on August 31, 2012, is discharged and the petition for habeas corpus is dismissed as moot.

WOODS, J.

I concur:

JACKSON, J.

PERLUSS, P. J., Dissenting.

I respectfully dissent.

The evidence Luis Buenrostro deliberately shot George Ramirez in an attempt to murder him is strong. Viewed in the context of the compelling evidence of his guilt, I cannot agree with my colleagues' conclusion that several isolated references to gangs and Buenrostro's gang membership or any of the other purported errors or tactical misjudgments that may have occurred "render[ed] the trial fundamentally unfair" or "resulted in a miscarriage of justice." (See generally *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 ["[d]efendant was entitled to a fair trial but not a perfect one"]; *Darden v. Wainwright* (1986) 477 U.S. 168, 183 [106 S.Ct. 2464, 91 L.Ed.2d 144] ["'Darden's trial was not perfect—few are—but neither was it fundamentally unfair'"].)

1. *Evidence of Guilt*

Buenrostro was convicted of the attempted murder of Ramirez with a related firearm-use enhancement.[1] At trial Ramirez, who was then in custody for contempt of court for failing to appear in this matter, claimed rather incredibly not to remember what had happened other than he had been shot in his right buttock. However, Los Angeles County Sheriff's Deputy Timothy Holt testified he had interviewed Ramirez in the hospital the day of the incident and Ramirez had told him "Prowler," an individual with whom Ramirez had grown up, shot him following an argument in the driveway of Ramirez's home. Ramirez believed Prowler had stolen his cell phone; Ramirez confronted him and punched Prowler in his face, but then retreated when a second man came to Prowler's aid. Prowler shot Ramirez as he ran toward his home.

Los Angeles County Sheriff's Detective Gina Kolowski also spoke with Ramirez at the hospital after the attack. Ramirez told her Prowler arrived at his home in a Nissan SUV; there were several other men in the vehicle. Ramirez said he hit Prowler in the

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[1] Buenrostro was also convicted of assaulting Ramirez with a firearm and the unlawful possession of a firearm by felon. He was sentenced to an aggregate indeterminate state prison term of 35 years to life.

face after Prowler made a comment about trying to call him, explaining he had become enraged at that comment because he believed Prowler had stolen his cell phone the day before. After being hit, Prowler returned to the SUV and retrieved a gun. Ramirez tried to run back to his house, but Ramirez shot him from behind as he approached his front door. Ramirez also told Kolowski that Prowler's real first name was Luis. Another law enforcement witness testified Buenrostro had earlier admitted to him he used the street name Prowler. That information was memorialized on a field identification card.

Deputy Holt and Detective Kolowski both testified Ramirez appeared alert and understood their questions. Dr. Cristobal Barrios, who treated Ramirez for his gunshot wound, testified he gave Ramirez some pain medication, but there was no evidence he was intoxicated and he did not test positively for alcohol at the hospital.

Buenrostro did not testify or present any other witnesses in his defense. In closing argument his counsel contended only that Ramirez's hospital interviews were not reliable because he had used drugs and alcohol that day and also suggested Buenrostro did not intentionally fire at Ramirez or had done so in self-defense (notwithstanding the fact that Ramirez was shot as he was running back toward his house for safety).

2. *Testimony Referring to Gangs, Gang Membership and Buenrostro's Gang Street Name*

The majority, like Buenrostro's appellate counsel, insist there were repeated, improper references to Buenrostro's gang membership that had an obvious and significant prejudicial effect on his defense. I read the record very differently. To be sure, the trial court initially ruled all gang references would be excluded, including use of the term "moniker" to refer to Buenrostro's street name or nickname, "Prowler."[2]

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[2] While judges, prosecutors, law enforcement personnel and members of the criminal defense bar may generally associate the word "moniker" with the alias of a member of a criminal street gang (although the term more often used in this context is "gang moniker"), to the extent the word is understood outside our specialized world, it simply means a nickname without any nefarious connotation. (See http://www.merriam-webster.com/dictionary/moniker [as of March 12, 2013]; see also

Notwithstanding that pretrial ruling, when questioning Ramirez and in an effort to explain his purported inability to recall any of the events surrounding the shooting, the prosecutor asked, "You don't think he [Buenrostro] is a gang member?" Ramirez responded, "No, sir." The prosecutor then asked, "You never told the police that you thought he was a gang member?" Ramirez again replied, "No, sir." In denying defense counsel's motion for a mistrial, presented out of the jury's presence, the court modified its earlier decision and ruled Ramirez's perception whether Buenrostro was a gang member was relevant and admissible to the witness's state of mind—that is, his fear of retaliation if he testified against Buenrostro—an extremely important issue in light of his evasive testimony and claimed lack of memory of the attack. The court also stated it would consider giving a limiting instruction, which it in fact did.[3]

The court's ruling, coupled with the appropriate limiting instruction, was well within its broad discretion. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869 ["[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible"]; see generally *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 ["trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice"].) Although it might have been better practice for the prosecutor to have alerted the court and defense counsel

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http://nba.si.com/2013/01/25/michael-jordan-new-orleans-pelicans-charlotte-hornets-bobcats/ [as of March 12, 2013] [New Orleans Hornets announced team "would be adopting the 'Pelicans' moniker following the 2012-13 season"].)

[3] The court instructed, "During the trial, evidence that George Ramirez believed Defendant was a gang member was admitted for a limited purpose. That purpose was to show identification and to explain George Ramirez's state of mind. You may consider that evidence only for that purpose and no other. No evidence was presented that Defendant is, in fact, a gang member." (See CALCRIM No. 303.)

and requested a modification of the pretrial ruling in advance of asking these two questions, his failure to do so in no way prejudiced Buenrostro.

One of Detective Kolowski's references to gang membership also falls into this same limited category of evidence properly allowed by the trial court in light of Ramirez's purportedly failed memory. Discussing Ramirez's fear of retaliation if he identified his attacker in a photographic lineup while still in the hospital, Kolowski testified Ramirez "said he was afraid that the Prowler's homies would come after him. And when I asked, 'homies?,' he said, 'Yeah, his other gang members.'" Additionally, because evidence of Ramirez's fear of retaliation from Buenrostro's confederates was admissible notwithstanding the absence of gang enhancement allegations, the prosecutor's brief comment on this evidence in closing argument was likewise proper.[4]

Several other passing references to gangs or Buenrostro's possible gang membership during trial, although arguably improper, were unquestionably trivial. In discussing his investigation of the case, Deputy Holt explained, after being told by Ramirez his attacker's name was Prowler, he provided the information he had obtained to "one of the gang units." Similarly, Detective Kolowski testified, when she received the call about the shooting, she thought "because of the area, it may be gang related." The detective also testified Ramirez had told her in the hospital, "[H]e grew up with Prowler. . . . [H]e knew his first name was Luis and that he was from Southside Whittier gang." Finally, Los Angeles County Sheriff's Deputy Luis Zamorano, who had learned from Buenrostro he used the street name Prowler, testified, "He said he went by the moniker of Prowler."

That is all there is. Yet in reversing Buenrostro's convictions the majority implicitly finds these four passing comments comparable to the evidence at issue in *People v. Albarran* (2007) 149 Cal.App.4th 214 in which we evaluated the prejudicial

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[4] In a single sentence during his closing argument the prosecutor said, "[H]e is afraid of Prowler who we know[] is the defendant because he thinks he is a gang member and fears retaliation."

impact of extensive gang evidence including threats to police officers, the defendant's gang tattoos, including one referring to the Mexican Mafia (identified by the prosecutor in that case as "a violent prison street gang that controls the Hispanic street gangs"), and descriptions of criminal offenses including drive-by shootings and robberies committed by gang members to gain respect and intimidate people. (See *id*. at pp. 220-221; see also *id.* at pp. 231-232, fn. 17 [trial was "infused with gang evidence"].) The difference between the "extremely inflammatory nature of certain gang evidence" in *Albarran* (*id*. at p. 231, fn. 17), which the majority held "was '"of such quality as necessarily prevents a fair trial"'" (*id.* at pp. 230-231), and the limited and relatively tepid gang evidence in this case, is palpable. Any error in allowing this evidence was necessarily harmless, even when measured by the federal constitutional standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 663 [*Chapman* harmless-error inquiry asks whether it is clear beyond a reasonable doubt a rational jury would have found the defendant guilty absent the error]; *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35] [same].)

3. *Evidence of Prior Convictions*

With respect to the evidence of Buenrostro's prior felony convictions, I agree only one such conviction was necessary to prove an element of the charge of unlawful possession of a firearm by a felon and defense counsel could even have stipulated to the existence of a prior felony, rather than allowing the jury to see a prison packet indicating multiple convictions. However, the evidence introduced did not include any details about the underlying conduct; none of the prior convictions involved the use of a firearm; and the nature of the offenses was not inherently inflammatory (five nonresidential burglaries, two convictions for driving a vehicle without the owner's consent and several other theft-related offenses). Moreover, the jury was properly instructed in accordance with CALCRIM No. 2510 that "You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the crime. Do not consider such evidence for any other purpose." We must

presume the jury understood and followed this limiting instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury'"]; accord, *People v. Lindberg* (2008) 45 Cal.4th 1, 26.) Nothing in the record indicates the jury disregarded the court's express instruction on this point or supports the majority's conclusion the admission of the prior conviction evidence led to an impermissible inference Buenrostro had a predisposition to criminality or a propensity toward violence.

In sum, neither the testimony regarding gangs and gang membership nor the evidence of Buenrostro's prior convictions deprived him of a fundamentally fair trial. To the extent error was committed, it was harmless Accordingly, I would not reverse the judgment on these grounds.

PERLUSS, P. J.